

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

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MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia SR

In the matter of:

SONJA L. HAWKINS

Debtor

Chapter 13 Case

Number 00-21303

ORDER ON DEBTOR'S MOTION TO ALLOW LATE CLAIM

Debtor Sonja L. Hawkins ("Debtor") filed her Chapter 13 case on October 6, 2000. At that time, she failed to include Sea Island Employees Credit Union ("the Credit Union") as an unsecured creditor in her bankruptcy schedules. Debtor's plan was confirmed on March 6, 2001.

Debtor alleges that her omission of the Credit Union from the schedules was unintentional. She had been paying \$157.74 indirectly through monthly automatic deductions from her paychecks and at the time she filed her Chapter 13 case "had simply forgotten about it." As a result, the Credit Union continued to deduct payments from her account after the bankruptcy case was filed. The payment "stubs" indicated that the deductions were continuing, but the stubs did not indicate the purpose of the payments.

The deadline for filing proofs of claim pursuant to Bankruptcy Rule 3002(c) was February 28, 2001. Twenty-seven days later, on March 27, 2001, Debtor's attorney wrote to the Credit Union to request its consent to a late-filed claim for the debt. The Credit Union did not

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respond to that request but continued to deduct payments from Debtor's account. On May 15, 2001, Debtor filed a Motion to Allow Late Filed Claim to allow the Credit Union to be paid through the confirmed plan as a general unsecured creditor. The Credit Union objected.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Bankruptcy Code provides for allowance or disallowance of claims in 11 U.S.C. § 502. The general rule is that claims which are filed are allowed. *See* § 502(a). One exception, however, is § 502(b)(9), which provides that a proof of claim which is not timely filed can be disallowed unless Code Section 726 applies [for the purpose of permitting subordinate payment of tardy claims in a Chapter 7 case] or unless the Rules of Bankruptcy Procedure provide for allowance of the tardy claim.

The Bankruptcy Rules provide time limits for filing proofs of claim. Under Rule 3002(c), Chapter 13 non-governmental creditors have ninety (90) days after the creditors' meeting to file a timely claim. Rule 9006(b) generally provides that bankruptcy courts may enlarge certain time periods specified in the Rules "where the failure to act was the result of excusable neglect," *id.* 9006(b)(1). However, the Rule, expressly limiting the situations in which a creditor may file a claim beyond the ninety-day period, *see id.* 9006(b)(2), (3), permits late creditor-filed claims in a Chapter 13 case only to the extent stated in Rule 3002(c), *id.* 9006(b)(3). Thus, Rule 9006 does not operate to extend a *creditor's* right to file a late claim¹ based on excusable neglect.

¹ Due process considerations are applicable, however. *See, e.g., In re Osman*, 164 B.R. 709, 715 (Bankr. S.D. Ga. 1993) ("The Bankruptcy Rules provide no exception to the harsh effect of Rule 3002(a), and accordingly, several courts have held that a creditor, who is without notice or actual knowledge of a bankruptcy case, is nonetheless prevented from tardily filing a proof of claim. Such a result is arguably violative of such a

In the instant case, however, the situation is unusual in that it is the *debtor* who is seeking to have the claim allowed and the creditor which is objecting. Where a creditor fails to file a timely proof of claim,² Rule 3004 permits the debtor to do so within thirty (30) days after the expiration of the ninety-day deadline. Because, unlike Rule 3002, Rule 3004 is not included in the limitations of Rule 9006(b), the time period in Rule 3004 may be augmented in the court's discretion under Rule 9006(b)'s general enlargement provision: "[T]he court for cause shown may at any time . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect," *id.* 9006(b)(1).

"Excusable neglect" encompasses "inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Pioneer Inv. Servs. Co. v. Brunswick Assocs., 507 U.S. 380, 388, 113 S. Ct. 1489, 1495, 123 L. Ed. 2d 74 (1993). Because "bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization," *id.* at 389, the Court suggested that "Rule 9006's allowance for late filings due to 'excusable neglect' entails a correspondingly equitable inquiry," *id.*, which should "tak[e] account of all

creditor's due process rights because the creditor's right to participate in any distribution of the debtor's assets is adjudicated and effectively extinguished without the creditor receiving proper notice and an opportunity to be heard.").

² The Credit Union's position is that Rule 3004 cannot apply to the instant situation because the Credit Union did not "fail" to file a proof of claim as necessary to trigger Debtor's ability to file the claim in place of the Credit Union under Rule 3004. See Letter Brief of Credit Union's counsel, July 31, 2001. While this argument is linguistically tenable, it defies logic. Under this interpretation, a debtor could file a claim during the thirty-day grace period when a creditor with notice of the case failed to file, but not when a creditor without notice of the case failed to file. "Fails to file" cannot be read as limiting the debtor's rights in such a counter-intuitive fashion.

relevant circumstances surrounding the party's omission," id. at 395.

I find that Debtor's omission of the Credit Union debt from her schedules was originally due to "inadvertence, mistake, or carelessness" arising from the fact that her payments were continuing on "automatic pilot" -- she undertook no conscious effort to pay this bill monthly. The continuum of explanations for failure to comply with a filing deadline ranges "from acts of God or unforeseeable human intervention, to 'very good reason[s]' by choice, to simply choosing 'to flout a deadline.'" Pioneer Inv. Servs., 507 U.S. at 387. Here, Debtor notified her attorney when she discovered her mistake, and her attorney sent a letter to the Credit Union within the thirty day extension period provided in Rule 3004. Thus, Debtor's failure to file the late claim within the thirty-day extension period was due to a "choice" which, in retrospect, was a "mistake" in that the choice to request the Credit Union's consent removed literal compliance from Debtor's control and placed it into the hands of the Credit Union. The Credit Union, for its part, not only ignored Debtor's request, but continued to deduct the automatic payments from Debtor's account despite its actual knowledge of the bankruptcy case.

Based on Debtor's effort to resolve the problem caused by her omission of the Credit Union from her schedules prior to confirmation, in combination with lack of any evidence of Debtor's bad faith in omitting the Credit Union debt from her schedules in the first place, I find that Debtor has met the "excusable neglect" standard as required under Rule 9006(b) and construed by the Supreme Court in Pioneer Investment Services.

Plan Modification

An alternative theory for allowing debtor-filed late claims is based upon on the modification provisions of 11 U.S.C. § 1329(a). Section 1329(a), however, provides for modification of a Chapter 13 plan after confirmation for only three discrete purposes.³ See In re Coleman, 231 B.R. 397 (Bankr. S.D.Ga. 1999) (construing 1329(a) purposes as exclusive list). Because modifying a plan for the purpose of adding an omitted creditor's claim after confirmation is not an included purpose, modification based on § 1329 is not possible in this case. Although Bankruptcy Rule 1009(a) provides that "[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the [bankruptcy] case is closed," Rule 1009(a) cannot amend the Code. Cf. 28 U.S.C. § 2075 ("The Supreme Court shall have the power to prescribe by general rules . . . the practice and procedure in cases under title 11. Such rules shall not abridge, enlarge, or modify any substantive right."); In re Hausladen, 146 B.R. 557, 560 n.5 (Bankr. D. Minn. 1992) ("[A]llowing late filed claims under Code section 502 may arguably conflict with Rule 3002 [I]f they were inconsistent [with each other], it is the rule that must fall, not the statute.") (citing United States v. Cardinal Mine Supply, Inc., 916 F.2d 1087, 1089 (6th Cir. 1990) (stating, in context of Chapter 7 issue: "We cannot have a statute that specifically allows payment of tardily filed claims and rules that prohibit their filing. Accordingly, to the extent that Rule 9006 contradicts the statute, it cannot stand."))).

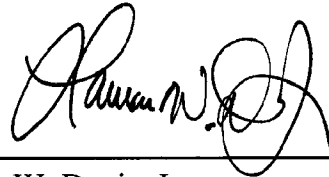
³ The purposes are: "(1) [to] increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) [to] extend or reduce the time for such payments; [and] (3) [to] alter the amount of the distribution to a creditor whose claim is provided for by the plan, to the extent necessary to take account of any payment of such claim other than under the plan." 11 U.S.C. § 1329(a).

CONCLUSION

I therefore hold that, absent consent of all parties, Debtor may not modify her plan to pay an omitted pre-petition claim. Debtor has, however, demonstrated excusable neglect in failing to file a claim on the creditor's behalf within the thirty days permitted under Rule 3004.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Debtor's motion is granted and the claim is allowed. The claim shall be paid in the manner of other claims similarly classified.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 28th day of September, 2001.